

Internal Revenue Service  
**memorandum**

CC:TL

Br4:KAAqui

date: **MAY 26 1988**

to: District Counsel, Manhattan CC:MAN  
Attn: J. Schmelzle

from: Director, Tax Litigation Division CC:TL

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subject: Voluntary Remittances Paid With Amended Returns  
After the Expiration of the Statute of Limitations

This is in response to your May 12, 1988, request for technical advice. Because the Service Center has some cases in suspense on this issue, you ask for our prompt response.

ISSUE

May the Service retain payments of tax made with Forms 1040X after the expiration of the period of limitations on the basis that the voluntarily paid tax does not exceed the correct tax liability for the year in issue.

CONCLUSION

This issue is governed by Rev. Rul. 74-580, 1974-2 C.B. 400. Tax which is paid and assessed after the expiration of the period of limitations amounts to an overpayment and may be refunded if a timely claim for refund is filed. Lewis v. Reynolds, 284 U.S. 281 (1932) does not require otherwise.

ANALYSIS

We will not repeat the discussions contained in the various memorandums to and from the Service Center attached to your incoming request. Suffice it to say that this office has always interpreted Rev. Rul. 74-580, as standing for the proposition that tax paid and assessed after the expiration of the statute of limitations amounts to an overpayment per se and is not impacted by the application of Lewis v. Reynolds, 284 U.S. 281 (1932) (taxpayer entitled to refund of only amounts in excess of correct tax liability). Accord, Morris v. Commissioner, T.C. Memo. 1966-245 ("The rationale underlying Lewis v. Reynolds is not properly applicable where, as here, the assessment and collection by the Commissioner was illegal.")

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On the other hand, tax paid prior to the expiration of the period of limitations does not constitute an overpayment even if assessment is barred. Rev. Rul. 85-67, 1985-1 C.B. 364. Thus, with respect to taxes paid but not timely assessed, the critical consideration is whether or not the payment was made prior to the expiration of the period of limitations.


Nonetheless, this issue is not without some controversy. Attached for your information is a copy of our May 25, 1988, formal technical advice response to District Counsel, Newark, in [REDACTED], where the identical issue is discussed.

As to the Service Center's supplemental request, a different result obtains in our view. As we understand the situation, it involves taxpayers who executed a restricted consent extending the period of limitations for [REDACTED] as to issue A. They subsequently filed an amended 1040X after expiration of the period of limitations and paid additional tax and interest with respect to issue B. You ask if the Service may retain these payments. First, taxpayers would have to file a timely claim for refund in order to raise the issue with the Service Center. If a timely claim is filed on the ground of the expiration of the period of limitations, we believe that the Service may retain the payments on the basis that taxpayers have not shown they overpaid their [REDACTED] tax liability up to the amount of the issue A adjustment. While we have been unable to locate any case authorities on point, this is the correct result viewing the taxpayer's [REDACTED] tax liability as an annual one as required by Sumner v. Commissioner, 333 U.S. 591 (1948).

If you wish to discuss the matter further, please call Mr. Keith A. Aquir at FTS 566-3308.

MARLENE GROSS  
Director

By:

  
HENRY G. SALAMY  
Chief, Branch No. 4  
Tax Litigation Division

Inclosure:

cc: 5/25/88 T/A response, [REDACTED]